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### Indigenous Courts and Justice Practices in Australia

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# Indigenous Courts and Justice Practices in Australia

## Abstract

Indigenous participation in sentencing procedures has been occurring informally in remote communities for some time. During the late 1990s, formalisation of this practice began in urban areas with the advent of Indigenous sentencing and Circle Courts. Formalisation has also occurred in remote areas. The aim has been to make court processes more culturally appropriate, to engender greater trust between Indigenous communities and judicial officers, and to permit a more informal and open exchange of information about defendants and their cases. Indigenous people, organisations, elders, family and kin group members are encouraged to participate in the sentencing process and to provide officials with insight into the offence, the character of victim-offender relations, and an offender's readiness to change.

This paper describes the range of practices used. It is a snapshot of current practice at year-end 2003 in Australia. As courts and justice practices evolve and grow, new processes will emerge.

## Keywords

indigenous, courts, practices, justice, australia

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## Indigenous Courts and Justice Practices in Australia

Elena Marchetti and Kathleen Daly

*Indigenous participation in sentencing procedures has been occurring informally in remote communities for some time. During the late 1990s, formalisation of this practice began in urban areas with the advent of Indigenous sentencing and Circle Courts. Formalisation has also occurred in remote areas. The aim has been to make court processes more culturally appropriate, to engender greater trust between Indigenous communities and judicial officers, and to permit a more informal and open exchange of information about defendants and their cases. Indigenous people, organisations, elders, family and kin group members are encouraged to participate in the sentencing process and to provide officials with insight into the offence, the character of victim-offender relations, and an offender's readiness to change.*

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**Toni Makkai**  
**Acting Director**

Involvement by members of the Indigenous community in sentencing urban Indigenous offenders began in South Australia in 1999, after several years' consultation with community groups. Since then, new justice practices have been established in other jurisdictions. These are:

- courts in urban centres, which set aside one to three days a month to sentence Indigenous offenders; and
- practices in remote Indigenous communities when judicial officers travel on circuit.

Examples of the first kind include the Nunga and Aboriginal Courts in South Australia, the Koori Courts in Victoria, the Murri and Rockhampton Courts in Queensland, and Circle Sentencing in New South Wales. The second comprises sentencing circles in more remote parts of Western Australia and New South Wales, and Justice Groups in Queensland. There is some overlap between the two; however, the differences reflect the varied contexts of Indigenous justice practices (urban, country, remote) and the different modes of Indigenous participation in the sentencing process. Similar developments are taking place in Canada, with the establishment of circles, community sentencing panels, and other practices (Green 1998) including the Gladue (Aboriginal Persons) Court in Toronto (Ehman 2001).

### Emergence of Indigenous justice practices

Indigenous urban courts and other justice practices have emerged for several reasons.

- It is believed they can address the over-representation of Indigenous people in the criminal justice system (Briggs & Auty 2003; Magistrates Court of Victoria 2003; Queensland Department of Justice 2003; Potas et al. 2003). Indigenous adults are 15 times more likely to be in prison than non-Indigenous persons (ABS 2003).

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- Many of the 339 recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) centred on reducing Indigenous incarceration and increasing participation of Indigenous people in the justice system as court staff or advisors. The RCIADIC is the moral touchstone for any policy or practice relating to Indigenous people and crime; thus, it is widely invoked to explain the need for these new courts and justice practices.
- Another reason is the emergence of Justice Agreements throughout Australia (Briggs & Auty 2003) that recognise the need for partnerships between state governments and Aboriginal organisations to build a better system of justice for Indigenous people.

While it is not difficult to explain why innovative Indigenous justice practices are emerging, we may ask why this is happening *now*. One reason is that legal reform takes time. Although the RCIADIC made its recommendations over a decade ago (in 1991), governments are slow to introduce new policies, especially those promoting change in race relations.

Another reason is that there is a new breed of magistrates and judges in the criminal courts who are taking a more activist stance in criminal justice policy. Simultaneously, there is support from some government ministers, departments, and court authorities. Such supporters have enabled the innovations of judicial officers to have some staying power.

There is also an international movement among Indigenous people that shares and encourages the development of Indigenous initiatives in justice practices.

## Indigenous urban courts and circles

The first Indigenous urban court was convened in Port Adelaide, South Australia, on 1 June 1999. Magistrate Chris Vass had worked for 15 years in Papua New Guinea (PNG). He returned to Australia in 1975 and was appointed magistrate in 1980. In the mid-1980s he started to do a circuit to the Pitjantjatjara

Lands, travelling there six times a year for 17 years (with a two-year hiatus). His considerable time on the circuit, coupled with his years in PNG, shaped his thinking about British and Australian colonial rule, race relations and law. A major element motivating Vass was to redress the deep distrust of Indigenous people toward the criminal justice system. In 1996 he began speaking with local Indigenous groups, the Aboriginal Legal Rights Movement and the Department of Aboriginal Affairs. From this, an Aboriginal Court Day was established and, soon after, it was named the Nunga Court.

Courts emerging since in Victoria (2002) and Queensland (2002) are based on the Nunga Court model, adapted to suit local conditions. More courts have been established in South Australian regional centres (Port Augusta, 2003), country towns (Murray Bridge, 2001) and remote areas (Ceduna, 2003). In New South Wales, the Circle Court is based on Canadian circle sentencing (Aboriginal Justice Advisory Committee 2000).

### *Jurisdictional variation and similarity*

Jurisdictions vary in their approaches, and the extent to which Indigenous people or groups are involved. Because they emerged spontaneously without a written reference (except the global RCIADIC recommendations), these courts are literally indigenous to the concerns of particular people and groups (usually local magistrates and Indigenous people), who believed that courtroom communication and procedure required modification for handling Indigenous cases.

Table 1 depicts urban sentencing courts by jurisdiction (it does not include other justice practices). While courts vary, they are similar in many respects:

- the offender must be Indigenous (or in some courts, South Sea Islander) and have entered a guilty plea;
- the charge is one normally heard in a Magistrates' Court (although this may change in the proposed Indigenous District Court in Ipswich, Qld); and
- the offence must have occurred in the geographical area covered by the court.

The magistrate retains the ultimate power in sentencing the offender. He or she sits at eye level to the offender, usually at the bar table rather than the bench, with a respected Indigenous person (or elder), whose role varies by jurisdiction. Some courts sit with one elder, and others with up to four. An elder's participation ranges from briefly addressing the offender about his or her behaviour to having a significant role in determining the sentence and monitoring the offender's progress. Some courts try to ensure that the sex of this person matches the sex of the offender, whereas others see 'all elders as being equal'. The degree of variation in the role of elder(s) *across* jurisdictions and *within* jurisdictions over time precludes any generalisation about their 'power' in the legal process. However, their power is advisory to the judicial officer, who is ultimately responsible for the decision.

The offender, even if in custody, sits at the bar table beside his or her solicitor. In some courts, magistrates insist that any handcuffs be removed. The offender typically has a support person (a family member or partner) beside him or her at the table. Once the charges have been read and defence counsel has responded, the offender and the support person are invited to speak directly to the magistrate about the offender's behaviour. People in the public gallery may also be asked to speak. The degree of informality adopted by the court varies by jurisdiction and magistrate but, in general, considerably more time is taken for each matter than would be the case in a regular court.

An important development is the presence of Indigenous court workers (variously called Aboriginal Justice Officers, Aboriginal Project Officers or Court Liaison Officers). Their role varies by jurisdiction. Some take an active role in assisting the prosecutor, offender and defence counsel to devise a sentence plan to present to the magistrate; some coordinate post-sentence follow-ups; and some do not speak during the sentence hearing but play a key role behind the scenes.

To date, only one jurisdiction (Victoria) has enacted specific legislation to recognise and give effect to its Indigenous court (*Magistrates' Court (Koori Court) Act*

2002). Other jurisdictions rely on general sentencing Acts to validate their procedural framework.

#### *Comparison of two jurisdictions*

The New South Wales Circle Sentencing Court and the South Australian Nunga Court exemplify how different these courts can be. The Circle Sentencing Court was established in Nowra in 2002 by an initiative of the Aboriginal Justice Advisory Council. It is 'designed for more serious or repeat offenders and aims to achieve full community involvement in the sentencing process' (Aboriginal Justice Advisory Committee 2000: 1). It selects those who are likely to receive a custodial sentence, the belief being that regular courts have had little impact and alternatives must be considered. The court does not sit in the local Magistrates' Court, but rather in a location that is more culturally appropriate

for the offender and the Indigenous community. Offenders are reviewed for suitability by the magistrate, when they first apply to appear before the court. After this occurs, the Aboriginal Community Justice Group (which consists of respected members of the community) determines if the offender is acceptable for the court process (Potas et al. 2003).

Participants sit in a circle, which has four community elders, the magistrate, the offender, the offender's support people, the Aboriginal Project Officer, the victim and their supporters, the defence counsel and the police prosecutor. The court is closed, and permission from the magistrate and the elders is required before observers can watch the proceedings by sitting outside the circle. The magistrate prepares a document, which describes the offence and relevant information about the

offender's background. The text is elaborated orally by all participants in court, including the offender. Circle members discuss what would be an appropriate sentence plan for the offender. It reconvenes after a few months to assess the offender's progress (Potas et al. 2003). The court typically considers just one offender, and convenes fortnightly.

By comparison, the Nunga Court sits in a special courtroom in the Port Adelaide Magistrates' Court two to three times a month. There may be eight to 12 people listed for sentencing on the day. There is no process of vetting offenders at high risk of incarceration, and no pre-court deliberations on a sentence plan or a written report. It is an open court, and people sit at eye level, but across several tables, not in a circle. While there is greater informality and less reliance on

**Table 1: Indigenous sentencing courts in Australia**

Jurisdiction	Locality	Name of court	Date established	No. of elders or respected persons sitting with magistrate	Layout of the courtroom
New South Wales	Nowra	Circle Court	Feb 2002	Four, selected from the community	Held in South Coast Aboriginal Cultural Centre; sit in a circle (no desk); closed court
	Dubbo	Circle Court	Aug 2003	Four, selected from the community	Sit in a circle (no desk); closed court
Queensland	Brisbane	Murri Court	Aug 2002	One, selected from a pool of 15	Normal magistrates' courtroom decorated with Indigenous paintings
	Rockhampton	As yet unnamed; includes three groups (Aboriginal people, Torres Strait Islanders and South Sea Islanders)	Jun 2003	One, selected from a pool of 8–10, but as many elders as possible turn up and observe	Normal magistrates' courtroom decorated with a painting and other insignia that reflects the participation of the three groups
South Australia	Port Adelaide	Nunga Court	Jun 1999	Three, selected from community (in 2003); previously one elder sat with the magistrate	Normal magistrates' courtroom with separate entrance decorated with Indigenous paintings
	Murray Bridge	Nunga Court	Jan 2001	One, selected from the community	Normal magistrates' courtroom
	Port Augusta	Special Aboriginal Court	Jul 2001	One, selected from the community	Normal magistrates' courtroom
	Port Augusta	Youth Aboriginal Court	May 2003	One, selected from the community	Normal magistrates' courtroom
	Ceduna	Aboriginal Court	Jul 2003	One, selected from the community	Normal magistrates' courtroom
Victoria	Shepparton	Koori Court	Oct 2002	Two, selected from a pool of 7; legislation permits just one to assist in the hearing	Remodelled courtroom with an oval table, 3 flags (Australian, Aboriginal and Torres Strait Islander), Indigenous paintings and noticeboard
	Broadmeadows	Koori Court	Mar 2003	Two, selected from a pool of 4; legislation permits just one to assist in the hearing	Remodelled courtroom with an oval table, 3 flags (Australian, Aboriginal and Torres Strait Islander) and Indigenous paintings



legal actors than one would see in a regular courtroom, and there are more Indigenous court workers and groups present on the day, it operates as an Indigenous court in a regular courthouse.

### Practices in remote areas

In many Australian states and the Northern Territory, judicial officers are (and have been for some time) using culturally sensitive practices when on circuit, which incorporate the views of elders or respected members of Indigenous communities. For example, when they travel to remote areas, magistrates like Antoine Bloemen (Western Australia) and Chris Vass (South Australia) have sought the views of community members for many years. These initiatives arose from magistrate encouragement of, and cooperation with, community members.

#### Queensland

In Far North Queensland, Indigenous justice groups were established in several remote communities in the early 1990s (Palm Island, Kowanyama and Pomparraw) after consultations with the Yalga-Bindi Institute (Chantrill 1998). During 1996–98, many more justice groups were established in Cape York and Gulf communities, and in other regional and urban centres. Today, there are nearly 40 groups. They vary in size, strength and scope; any one Justice Group's strength and viability may vary over time, as coordinators come and go, or as a community faces internal conflicts. Justice Groups comprise respected community persons (or elders), although young people can also be members.

During the 1990s, Justice Groups used community norms and mechanisms of Indigenous social control in responding to crime, provided pre-sentence advice to judicial officers, visited incarcerated Indigenous people, and at times supervised offenders on community-based orders. Legislation taking effect in 2001 formalised their powers, requiring the court (whether it be the Magistrate, District or Supreme Courts) to 'have regard' to the views of community members in sentencing offenders (*Penalties and Sentences Act 1992 s. 9(2)(o)*). Resulting from the Fitzgerald

(2001) Cape York Justice Study, legislation tabled in September 2002 created a new governance structure in remote Indigenous communities (*Community Services Legislation Amendment Act 2002*). Justice Groups were given a legislative basis, including rules for their establishment and membership, as well as new duties and responsibilities.

#### Victoria

Similar to Queensland's Justice Groups are the Community Justice Panels in Victoria, which resulted from a joint initiative of the Victorian Aboriginal Community, Victorian Aboriginal Legal Service and the Victorian Government in 1987. They are currently funded and administered by Victoria Police (Victorian Aboriginal Legal Service 2003). Indigenous panel members, who live in regional Victorian towns and cities, volunteer their time to work with criminal justice agencies to improve the treatment of Indigenous offenders. The panels take custody of Indigenous offenders, arrange legal advice for offenders, liaise with the offender's family, and provide information about an offender's background and other relevant information to judicial officers at sentencing (Commonwealth Attorney-General's Department & ATSIC 1997).

#### Western Australia

Reflecting a cross-fertilization of urban and remote justice practices, a Circle Court was recently established in Yandeyarra, an Aboriginal community of approximately 250 people located in the Pilbara in Western Australia. The Clerk of the Court helps organise the hearings, and the Yandeyarra Community Coordinator contacts the elders. The Circle Court sits with two elders from the Yandeyarra community. After the prosecutor and defence counsel present their case and the offender is invited to speak, the elders and the magistrate have a private discussion, in another room, about the sentencing options for the offender. Their determination is jointly communicated to the offender in court.

#### New South Wales

New South Wales plans to expand its Circle Sentencing Court to Walgett and Brewarrina, which are small and

predominantly Indigenous communities in the north of the state. The court will sit once a fortnight when the magistrate travels there on circuit, and will operate like the urban Circle Court in Nowra.

#### Northern Territory

In the Northern Territory, several statutes now recognise Aboriginal customary law in sentencing. This has led Northern Territory courts, including the Supreme Court, to take 'payback' (Indigenous punishment) into account as a mitigating factor in sentencing (see for example *R v Walker*, unreported, Northern Territory Supreme Court, 10 February 1994, SCC No 46 of 1993; see also Finnane 2001). Judicial officers are expected to seek advice from the community before imposing a sentence (Commonwealth Attorney-General's Department & ATSIC 1997).

### Discussion and implications

Indigenous courts, circles, and other justice practices indicate a transformation in our justice system. Although the practices are experimental and fluid, they will lead to changes in how justice is done for both Indigenous and non-Indigenous people. Indigenous sentencing courts may resemble other specialised courts in Australia (for example, drug courts or domestic violence courts), but they differ in what motivates them politically. In changing how justice gets done, Indigenous sentencing courts can change judicial and legal actors, they can empower Indigenous elders and other community members, and they may change attitudes of Indigenous offenders.

Some commentators suggest that Indigenous justice practices exemplify therapeutic justice or restorative justice (Freiberg 2001), but we disagree. From our fieldwork and interviews in South Australia, Queensland, New South Wales, Victoria and Western Australia, we find that they are in a category of their own. In particular, the role of 'the Indigenous community' (in quotation marks to reflect its diverse interests and positions) is a key influence in correcting and modifying established criminal processes, in ways that are less apparent to relevant 'communities' in other specialized courts.

The black robe appears to be deferring to the black face and, at the same time, Indigenous people are embracing portions of white law. Sometimes Indigenous groups may decline to participate in sentencing recommendations for some offences (such as sex offences), thinking it best left to white law.

Some may view these new justice practices as tokenistic or paternalistic, signalling little change in Indigenous-white justice relations (Tauri 1999). However, our research suggests that judicial officers and other legal officials, elders, community people, paid workers and volunteers are working in a sincere and dedicated way to make these new justice practices meaningful and effective. This requires open communication, using Indigenous knowledge and social control, and fashioning appropriate penalties.

#### Communication

These new practices focus on the processes of communication between a judicial officer, the offender and other relevant people. With an honest exchange of information, a judicial officer has a better understanding of offenders and the context of their offending. Optimally, the court's work is not about 'processing' a case or 'finalising a file' but, rather, learning more about the offender and the offence, and making an effort to develop an appropriate response. Defendants, their supporters, elders and other community people are expected to talk more in these courts than prosecutors and defence lawyers. In reflecting on the Nowra Circle Court, Magistrate Doug Dick (2003) said the Circle 'removes physical and verbal barriers', 'there is no pompous lawyering' and 'the offender is no longer shielded by his or her lawyer'. South Australian Magistrate Chris Vass states:

There's a lot of effort in running the court...it's very tiring, it's very draining. The other courts are easy, dead easy. This is not...because you've got to balance so many things...and you're taking risks.

The necessity to think laterally, outside the box of the white legal frame and its relevancies, is typically mentioned by all the court actors (judicial officers, prosecutor, and defence) we spoke with.

#### Indigenous knowledge and social control

Elders, respected persons or cultural advisors take varied roles inside and outside the courtroom. Inside, one or more may sit near a magistrate at the bar table, or they may sit in the public gallery. Some may provide specific knowledge about an offender (such as 'he started to get into trouble when his father committed suicide') or specific 'cultural knowledge' (such as the need to attend a funeral), but provide no advice about sentence. Others may confer before the court sits, discuss the court list and prepare an oral or written report to the judicial officer (as some of the Queensland Justice Groups do). Still others may speak to the offender directly in the courtroom about how their behaviour has affected their family and community.

Appearing in court and speaking about one's offending can be an embarrassing, fearful and non-meaningful experience for many Indigenous offenders (McRae et al. 2003). The presence of elders or respected persons in court can be effective in imparting a positive and constructive notion of shame, which comes from Indigenous people speaking to and supporting an offender, rather than from a more distant legal authority, who may make offenders feel afraid and bad about themselves (Potas et al. 2003).

The role of elder can be tricky, however, especially in remote communities, where it may appear that an elder is 'whispering in the magistrate's ear', saying negative things about the defendant, or perceived as being biased against the offender because of kin or family ties. Court officials are well aware of these potential problems.

Outside the courtroom, the Queensland Justice Groups are also sought by community members (and at times the police) to resolve disputes and to speak to offenders before (or after) the matter comes to police attention. In Nowra, Magistrate Dick (2003) reports that 'the Circle Court doesn't end in the courtroom, but continues with the encouragement of Circle members'. Thus, what occurs inside the courtroom may strengthen informal social control outside; and in turn, with strengthened informal social control may come a more peaceful community.

#### Appropriate penalties

If there is anything that may threaten these practices politically, it is the perception that the penalties imposed are more lenient than those in a regular court. Even if we had the requisite data, it would be difficult to assess this claim systematically or with any degree of accuracy. In addition, there can be variation by magistrates within any one jurisdiction. Some say that when Indigenous offenders confront black and brown faces in positions of authority, it is not a 'soft option'; rather, it can be more difficult because offenders have to answer to elders or respected persons. About the Nowra Circle Court, Magistrate Dick (2003: 10) was emphatic in saying 'the process is punishment, real punishment'. About the Rockhampton Court, Magistrate Hennessey says 'this is not special treatment or a soft option'.

One commonly mentioned effect of the Nunga and Koori Courts is that a higher proportion of defendants show up on the day. This has led to reductions in arrests for non-appearance by offenders on bail. To overcome the cycle of Indigenous imprisonment for unpaid fines, there are alternative penalties such as community service or graduated methods of paying fines. There have been just two prosecutorial appeals on Nunga Court sentences ('manifestly inadequate') since mid-1999, both of which were upheld.

#### Conclusion

Indigenous courts and other justice practices have emerged with great energy in the 1990s. They have been well received by Indigenous groups, who better trust and understand a court's decisions because they are involved and have a say (Briggs & Auty 2003). Indigenous defendants and their supporters 'have a voice in court' (Welch 2002: 5). Greater attention to the reasons for and contexts of the offending behaviour, coupled with 'Indigenous-friendly' procedures and Aboriginal justice workers, make the urban court experience more meaningful and less alienating. In remote areas, magistrates and judges are relying on Justice Groups' oral and written submissions at sentencing. It will take some years to see the long-term influences of these courts and justice practices. We know they are not grinding

down offenders, nor pushing them deeper into the criminal justice system. Instead, they have the capacity to change the attitudes of judicial officers, other legal officials and Indigenous participants.

Some critics believe Indigenous courts deliver 'apartheid justice'. We take another view. The core elements animating these courts—improved communication, citizen knowledge/control and appropriate penalties—could be applied to all court processes and all defendants. These new justice practices may indeed be signalling the way of the future, and transforming our courts as we now know them.

## Notes

1. There are different conventions for capitalising certain words (for example, 'Elder', 'Respected Person', 'White' or 'Black'), but we have chosen to use minimal capitalisation.
2. Our information is based on field research and interviews conducted with judicial officers, legal officials, other court workers and Aboriginal community people, along with the published literature. It is current as of December 2003.
3. In South Australia and Queensland there are no limits on the offences that may be sentenced. Victoria does not permit sexual and family violence matters. New South Wales does not permit strictly indictable offences, sex offences, and strictly indictable drug offences (see *Magistrates' Court (Koori Court) Act 2002* (Vic) s. 4F (1)(b); Potas et al. 2003).
4. The Northern Territory and the ACT are considering establishing Indigenous sentencing courts, but this has not yet occurred (Northern Territory Government 2003; fieldnotes, ACT 2003).
5. There are plans for a new Magistrates' Court in Port Augusta, which will have moveable furniture for the purposes of improving communication.

6. A third Koori Court was launched in Warrnambool on 18 December 2003 with its first sitting in 2004. Its proposed practices will be similar to the other Koori Courts.
7. Two Queensland urban developments are presently taking place: Townsville's Children's Court currently has the involvement of Justice Group members, and in Brisbane there are plans to convene a Murri Court in the Children's Court in 2004.

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